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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MUOI VAN DUONG,

Defendant and Appellant.

2d Crim. No.B288716
(Super. Ct. No. 2017027903)
(Ventura County)

Muoi Van Duong was convicted by jury of using force or violence to resist officers. (Pen. Code, § 69.)¹ Police were investigating a report that appellant was trying to break down the door to a home. En route to the call, officers were advised of

¹ Section 69 applies to “[e]very person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty”

Unlabeled statutory references are to the Penal Code.

an outstanding warrant for appellant's arrest. When they tried to take him into custody, he fought them and injured an officer.

We affirm. First, substantial evidence supports the jury's finding that appellant knew the officers were performing their lawful duty when he used force to resist them. Second, the court did not err by failing to instruct on the lesser included offense of assault because there is no evidence that the offense was less than a section 69 violation. Third, the court did not abuse its discretion by admitting, with limiting instructions, a police dispatch tape. The evidence against appellant is overwhelming. No miscarriage of justice occurred. (Cal. Const., Art. VI, § 13.)

FACTS AND PROCEDURAL HISTORY

On August 6, 2017, Oxnard police received a 911 call from appellant's brother Hai Duong, who said that appellant was outside and "broke . . . the door . . . to the house." Asked to explain appellant's conduct, Hai Duong replied, "he do drugs." He identified appellant as "Timmy Duong."

Officers Hayley Bracken, David McAlpine and Jamie Toney went to Hai Duong's house in uniform, driving marked patrol cars. The dispatcher told them that appellant was on parole, was subject to restraining orders, and had an outstanding arrest warrant for a parole violation. Bracken testified that they had a duty to take appellant into custody on the warrant. Also, she mistakenly believed that the restraining orders applied to the address; the dispatcher did not mention that the orders were unconnected to Hai Duong's home.

Bracken saw no one at Hai Duong's front door. She entered the side yard through a partially open gate and saw appellant, whom she knew from a prior encounter as "Timmy." The exchange between appellant and the officers was captured on

body cameras. McAlpine and Toney believed appellant was under the influence of drugs because he was sweating, grinding his teeth, fidgeting and had rapid speech.

When Bracken asked appellant if she could talk to him, he demanded to know who called the police. Without identifying the caller, she assured him that someone called. Appellant stated that his family was inside in the house, adding “they’re chicken” and “they hide.”

McAlpine testified that appellant, as a parolee, can be searched and detained at any time and must cooperate with police. To gauge appellant’s honesty and cooperation, McAlpine asked if he was on parole, which he denied. McAlpine directed appellant to relinquish the cell phone in his hand and to extend his wrist. When McAlpine took hold of appellant’s left wrist to prevent him from fleeing, he tried to jump and spin out of McAlpine’s grasp. McAlpine described appellant as “extremely strong and resistant” to cooperating with a parole search.

Bracken tried to gain control of appellant’s right arm. He hit his head into her chin and mouth in a movement she and McAlpine described as a “headbutt.” Toney grabbed appellant’s legs. They lowered appellant to the ground and handcuffed him. Bracken had a swollen lip and a bruise inside her mouth from the headbutt.

For safety reasons McAlpine did not tell appellant about the arrest warrant before taking him into custody, to prevent him from devising a plan of escape. After the scuffle, Toney told appellant about the warrant. He demanded to see it. En route to the jail, appellant yelled that he “knocked [Bracken] in [her] head, and that if [she] did not show him the warrant, he would

kick [her] in [her] head.” The recorded threat was played for the jury.

The jury convicted appellant of violating section 69, subdivision (a). In a bifurcated trial, it found true that he committed two serious prior felonies (assault with a deadly weapon and making criminal threats) and served three prior prison terms. (§§ 245, subd. (a)(1), 422, 667, subds. (c)(1), (e)(1), 667.5, subd. (b).) The court sentenced appellant to seven years in prison, consisting of two years for the new conviction, which was doubled under the Three Strikes Law, plus three years for the prison priors.

DISCUSSION

Sufficiency of the Evidence

The jury was instructed that the prosecution must prove (1) appellant unlawfully used force or violence to resist an officer; (2) when he acted, the officer was performing a lawful duty; and (3) appellant knew the officer was performing a duty. In summation, defense counsel conceded that the officers were performing their lawful duty and appellant “absolutely willfully resisted.” Appellant argues that “[t]here was no evidence to support the knowledge element of the charged crime.” We disagree. Viewing the evidence in the light most favorable to the verdict, any rational trier of fact could find, beyond a reasonable doubt, that appellant knew the officers were performing their duties. (*People v. Holt* (1997) 15 Cal.4th 619, 667 [standard of review].)

Section 69 “is designed to protect police officers against violent interference with performance of their duties.” (*People v. Martin* (2005) 133 Cal.App.4th 776, 782.) The defendant must know the person being resisted is an officer engaged in the performance of his or her duties. (*People v. Hendrix* (2013)

214 Cal.App.4th 216, 237.) The jury was instructed that “[t]he duties of a peace officer include responding to calls for service, investigating crimes, enforcing parole terms and conditions, and arresting persons for arrest warrants.”

Substantial evidence supports the jury’s implied finding that appellant knew uniformed officers were investigating his attempts to break down his brother’s door. The first thing he asked was “Who called you?” Bracken replied, “Oh, I’m not sure yet. But they did call us.” Moments later, McAlpine asked appellant, “are you on parole?” The jury could find that when appellant resisted arrest, he knew the officers were performing their duties in responding to a service call and checking his parole status, satisfying the knowledge element of section 69.

Appellant argues that he was unaware the officers intended to arrest him on a warrant. However, the testimony shows that police have safety reasons not to mention an arrest warrant, to avoid giving the arrestee an opportunity to plan an escape or attack upon the officers. It is especially true here, where appellant was agitated, appeared to be under the influence of drugs, and acknowledged that family members were hiding from him in fear. It is enough that appellant knew the officers entered the yard and detained him to carry out their duty to investigate a citizen complaint about his violent behavior, even if he was unaware of the arrest warrant. As a matter of public policy, a person who knows or should know that he is being arrested by police has a duty “to refrain from using force or any weapon to resist such arrest,” even if the arrest is unlawful. (§834a; *People v. Richards* (2017) 18 Cal.App.5th 549, 564.)

*Failure to Instruct on the Necessarily Included
Offense of Assault*

Appellant argues that the court had a sua sponte duty to instruct on assault. Assault is a necessarily included lesser offense of section 69 if the defendant is alleged to have resisted an officer with force or violence. (*People v. Brown* (2016) 245 Cal.App.4th 140, 153 (*Brown*).) Defense counsel did not request an assault instruction; instead, the jury was instructed on the offense of resisting a peace officer. (§148, subd. (a).)² We review de novo the court's failure to give a necessarily included offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

"[A] trial court is not required to instruct the jury on a necessarily included offense "when there is no evidence that the offense was less than that charged." (*People v. Smith* (2013) 57 Cal.4th 232, 245, quoting *People v. Breverman* (1998) 19 Cal.4th 142, at p. 154.) We conclude that the court was not required to instruct on assault because there is no evidence that the crime was less than the charged offense.

The evidence established that appellant knew why the officers were there. Hai Duong called 911, saying that appellant was trying to break down the door. Officers were dispatched to investigate. Appellant was not visible from the street. The officers sought him out by passing through a gate into a side yard. He immediately asked who called them and was told they were there because someone called for help. He was questioned

² The jury was instructed that section 148 applies if (1) Bracken was lawfully performing or attempting to perform her duties; (2) appellant willfully resisted her performance of those duties; and (3) he knew or reasonably should have known that she was a police officer performing or attempting to perform her duties.

about his parole status. No reasonable juror could conclude that appellant was unaware the officers were carrying out their duties when he resisted them with force or violence.

Though appellant may not have known about a warrant for his arrest, an officer's duties extend beyond executing arrest warrants, and the jury was so instructed. It is of no moment if appellant was unsure whether they were arresting him for making criminal threats, trespassing, or a parole violation.

Appellant relies on *Brown, supra*, 245 Cal.App.4th 140. It does not assist him. Brown fought with officers who wanted to cite him for riding a bicycle without a light on the sidewalk while wearing headphones. He claimed the officers attacked him without provocation while he was lying face down after falling; the officers claimed that he attacked them. (*Id.* at pp. 146-147.) An assault instruction was required because there were conflicting versions of the event that could allow the jury to conclude "that Brown used excessive force or violence to resist arrest only in response to the officers' unreasonable force. Under that scenario, Brown could have been found not guilty of the section 69 violation, but still guilty of the lesser crime of assault." (*Id.* at p. 154.)

No such ambiguity exists here. Body camera images show that officers approached appellant and spoke to him calmly and respectfully. After a brief discussion, McAlpine took appellant's wrist. He responded by fighting McAlpine and head butting Bracken, yet suffered no injury despite his unexpected violence. His case is not analogous to *Brown*, in which the defendant and the officers described different versions of their encounter and a jury could find that Brown was trying to protect himself from an unprovoked beating. No jury could make such a finding here.

Camera images show that appellant violently resisted a concededly lawful arrest made without excessive force.

Evidence of Restraining Orders

Citing Evidence Code section 352, appellant moved to exclude evidence that he was the subject of two restraining orders, which were unconnected to Hai Duong and his house. The court denied his motion. The court has broad discretion to determine the admissibility of evidence; we review its ruling for abuse of discretion. (*People v. Riggs* (2008) 44 Cal.4th 248, 289-290.)

The restraining orders were not admitted into evidence. They were mentioned in the dispatch to patrol officers, to show what information they had and how it affected their actions. A dispatch recording is nontestimonial evidence describing police actions. (*People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1224-1225.) When Bracken responded to the service call, she believed appellant was violating restraining orders by trying to force his way into a home.

The court was within the bounds of reason in ruling that the evidence was not unduly prejudicial. (Evid. Code, § 352; *People v. Orloff* (2016) 2 Cal.App.5th 947, 956-957.) The court instructed the jury three times that matters discussed in the dispatch recording, including the restraining orders, “is not being admitted to prove that what’s actually said here is true. It’s being admitted because that’s the information the police had when they went to the scene to explain why they did what they did” and what the police “thought was going on at the time they went to the residence.” We must presume the jury followed the instructions. (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.)

The evidence against appellant was overwhelming. It is highly improbable that a more favorable outcome would have been achieved if the restraining orders had not been mentioned. Hai Duong called 911 seeking police assistance because appellant was trying to break down his door. Three officers went to the Duong residence and encountered appellant; he knew that someone called them. His unprovoked violence was filmed from three angles and shown to the jury.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Charles W. Campbell, Judge
Superior Court County of Ventura

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